

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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**INNOVATIVE MEDICAL SYSTEMS, INC.**

a Missouri corporation, et. al;

**GENESIS MEDICA, INC.; SC MEDICAL,  
LLC; and ASSOCIATED PROVIDER  
SERVICES, INC.,**

Plaintiffs,

v.

**MEMORANDUM OF LAW & ORDER**

Civil File No. 04-4705 (MJD/JGL)

**AUGUSTINE MEDICAL, INC. and  
ARIZANT, INC.,**

Defendants.

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Larry A. Bagsby, Bagsby & Lee, L.L.C. for and on behalf of Plaintiffs.

B. Todd Jones, Stephen P. Safranski and David J. Wallace-Jackson, Robins,  
Kaplan, Miller & Ciresi, L.L.P. for and on behalf of Defendants.

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**I. INTRODUCTION**

The above-entitled matter comes before the Court upon the Report and Recommendation of Chief United States Magistrate Judge Jonathan Lebedoff dated August 2, 2005. Defendants filed objections to the Report and Recommendation, and Plaintiffs filed a response to those objections. Pursuant to statute, the Court has conducted a de novo review of the record. 28 U.S.C.

§ 636(b)(1); Local Rule 72.1(c). Based on that review the Court adopts in part and modifies in part the Report and Recommendation dated August 2, 2005.

## **II. BACKGROUND**

The Court adopts the facts as set forth in Part I of the Report and Recommendation.

## **III. DISCUSSION**

### **A. Exceptional Circumstances under Rule 60(b)**

The Chief Magistrate Judge recommended that the Plaintiffs' Renewed Motion for Leave to File First Amended Complaint and for Relief From Judgment Under Federal Rule Civil Procedure 60(b) [Doc. No. 67] be granted on the grounds that this Court's non-prejudicial dismissal of Plaintiffs' fraud count created an exceptional justifiable reason sufficient to reopen the case under FRCP 60(b). For the reasons that follow, the Court finds that there are no exceptional circumstances warranting relief.

FRCP 60(b) provides for relief from judgment in any of several enumerated circumstances and "for any other reason justifying relief from the operation of judgment." Fed. R. Civ. P. 60(b). Such relief, however, is an "extraordinary remedy" that is only justified by "exceptional circumstances." Terra Intern. Inc. v. Robinson, 113 Fed. Appx. 723 (8th Cir. 2004) (unpublished). Relief from judgment is available "only where exceptional circumstances have denied the

moving party a full and fair opportunity to litigate his claim and have prevented the moving party from receiving adequate redress.” Harley v. Zoesch, 413 F.3d 866, 871 (8th Cir. 2005). Rule 60(b) is not triggered even if the new claim “might have merit” if the plaintiff “failed to demonstrate exceptional circumstances prevented him from asserting it earlier.” Hepper v. Adams County, 133 F.3d 1094 (8th Cir. 1998).

By their Motion for Relief from Judgment and For Leave to Amend, Plaintiffs attempt to replead only their proposed count of fraud and conspiracy to commit fraud as to the original Defendants and as to the six parties whom Plaintiffs previously attempted to add. Plaintiffs do not specify under which prong of Rule 60(b) they seek relief, nor do they state reasons for failing to plead information that has been within Plaintiffs knowledge at all times.

The Court does not find exceptional circumstances warranting the application of Rule 60(b) because Plaintiffs have not plead any exceptional circumstances sufficient to trigger the extreme relief that Rule 60(b) provides.

#### **B. Sanctions under 28 U.S.C. § 1927**

Finally, Defendants assert they are due sanctions for having to defend against the instant motion. Title 28 U.S.C. § 1927 authorizes the Court to impose attorneys’ fees and costs against an attorney who “multiplies the proceedings in

any case unreasonably and vexatiously.” The Court does not find evidence that the motion was filed for harassment or to prolong the litigation. Accordingly, the Defendants’ Motion for Sanctions is denied.

Based on its de novo review of the record, the Court adopts in part and modifies in part the Report and Recommendation dated August 2, 2005 [Doc. No. 80].

**IT IS HEREBY ORDERED** that:

1. Plaintiffs’ Renewed Motion for Leave to File First Amended Complaint and for Relief From Judgment Under FRCP 60(b) [Doc. No. 67] is **DENIED**.
2. Defendants’ Motion for Sanctions pursuant to Title 28 U.S.C. § 1927 is **DENIED**.

Dated: October 14, 2005

s/ Michael J. Davis  
Judge Michael J. Davis  
United States District Court